IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM A. KUBRICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit, reported at 581 F. 2d 1092, and the opinion of the United States District Court for the Eastern District of Pennsylvania, reported at 435 F. Supp. 166, appear in Appendices A and B respectively of the Petition. Both Courts found in favor of the plaintiff and against the defendant.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Does a medical malpractice claim under the Federal Tort Claims Act accrue when the plaintiff learns of all elements of his claim i.e. causation, damages, the duty owed to him by the defendant and the breach of that duty where (1) plaintiff is hindered from learning both causation and malpractice and (2) the medical causation question is technically complex?

STATUTORY PROVISION INVOLVED.

28 U. S. C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail, of notice of final denial by the agency to which it was presented.

STATEMENT.

This case stems from a malpractice action initiated by William A. Kubrick, a disabled Korean War veteran, who suffered severe hearing loss and resultant speech impairment caused by post operative leg wound irrigation with a solution of Neomycin Sulfate. The procedure which caused the loss and impairment was administered under the direction of United States Veterans Administration physicians.

An action was filed by Respondent, William A. Kubrick, now 48 years old, against the United States of America under the Federal Tort Claims Act, 28 U. S. C. § 1346 for the profound damage he suffered as a result of the aforementioned malpractice.

The matter was tried before the Honorable Edward R. Becker of the United States District Court for the Eastern District of Pennsylvania sitting without a jury.

The facts as adduced at trial and as found by Judge Becker show that Kubrick entered the Wilkes-Barre Veterans Administration Hospital on April 2, 1968 for treatment of a bone infection (osteomyelitis) of his right leg. After surgery on the affected leg, a Veterans Administration physician ordered that a solution of an antibiotic, Neomycin, be used to irrigate the wound.

In June 1968, Respondent noticed both a hearing loss, and a ringing in his ears (tinnitus). Prior to the administration of the Neomycin, Kubrick's hearing had been completely normal. About six months later (November 1968), Joseph Sataloff, M.D., a hearing specialist in Philadelphia, advised Respondent that he was suffering from bilateral nerve deafness and that the deafness was or probably was caused by the administration of Neomycin.

Respondent then sought increased disability benefits under 28 U. S. C. § 351 because of the hearing loss. Kubrick had only a twelfth grade education, no medical training, and had relied on the representations of his physician that his hearing loss was due to the Neomycin; and submitted this information in support of his claim to the Veterans Administration.

In August, 1967, the VA Board of Physicians denied the claim. The physicians, in direct contradiction of Dr. Sataloff, concluded that there was no causal connection between the Neomycin therapy and the hearing loss. The Board also declared that there was no evidence of carelessness, error of judgment or lack of proper skill on the part of the VA. The VA officials and physicians, sitting in judgment of Kubrick's case, from 1969 until its final denial of Respondent's claim in April 1973, consistently and

tenaciously held to its position that there was no negligence on the part of VA doctors, and that there was no causal connection between the use of Neomycin on the Respondent and his hearing loss.

A VA adjudication officer advised Kubrick in September, 1969, in consonance with earlier VA appraisals of his condition, that Respondent's claim had been denied because his hearing loss was not attributable to VA treatment. Mr. Kubrick filed a "Statement in Support of Claim" on September 25, 1969, in response to which the VA again negated a causal connection between the Neomycin irrigation and the Respondent's hearing impairment. After Respondent received statements from a hearing specialist and from the Public Health Service, that Neomycin could be ototoxic, he wrote to various public officials entreating them to help him obtain disability benefits. Again, as they had done repeatedly before, the VA denied a causal connection between the administration of the Neomycin and Kubrick's deafness.

From January 13, 1970 until February 16, 1970, Kubrick was hospitalized at the Veterans Hospital in Wilkes-Barre. An extensive audiometric examination was conducted and the examination revealed that Mr. Kubrick suffered from severe bilateral sensoneural hearing loss which foreclosed speech discrimination, and that a hearing aid would be useless for his condition.

In May, 1971, the Veterans Administration sent Respondent a copy of a field investigation report, which purported to contain an interview with Dr. Soma, a physician who had seen Kubrick soon after his leg operation. The report stated that Dr. Soma believed Respondent's problems stemmed from his employment in a machine shop. Kubrick confronted Dr. Soma with the report on June 2, 1971. Not only did Dr. Soma deny the report, but he told

Respondent that in his opinion the Neomycin was the sole cause of the veteran's hearing disability, and that the Neomycin medication should never have been used. As a final blow, after Kubrick's discussion with Dr. Soma, the Board of Veterans Claims denied Respondent's claim on August 9, 1972. It is important to note that subsequent to the commencement of suit in this case, the Board of Veterans Claims finally reversed itself and found that there was sufficient proof of causal connection between the administration of Neomycin and Kubrick's hearing loss; and awarded him further disability benefits based upon the hearing loss.

Following a lengthy bench trial, Judge Becker found that the government was liable and awarded damages of $320,536.00. The Court of Appeals for the Third Circuit, in a unanimous decision, affirmed the trial court on the crucial issues of the statute of limitations, negligence, causation and on all damage issues except for a set off involving the increased VA disability benefits for which a remand was ordered to allow for recalculation of damages.

A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit was filed on December 21, 1978.

ARGUMENT.

The sole issue before this court is the question of the application of the Statute of Limitations. No argument is presented by the Petitioner on the questions of malpractice or causation.

An action under the Federal Tort Claims Act is barred within two years after the "claim accrues" 28 U. S. C. 2401(b). Where an act of malpractice is not immediately apparent to the victim, the Circuit Courts have uniformly held that a claim accrues when the victim "discover[s] or in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice." [1]

This rule was formulated in the case of *Quinton v. United States*, 304 F. 2d 234, 240 (5th Cir. 1962). The Quinton rule was derived from a landmark decision of this Court in *Urie v. Thompson*, 337 U. S. 163 (1949). In Urie, a railroad employee's claim under the Federal Employer's Liability Act was not ruled to be time-barred even though it was not apparent when he contracted the silicosis that prevented him from working. While the court found the condition may have begun any time between 1910 and 1940, plaintiff was not charged with being aware of the

1. 29 ALR Fed. 482, § 6 and cases cited therein including *Toal v. United States*, 438 F. 2d 222 (2nd Cir. 1971); *Tyminski v. United States*, 481 F. 2d 257 (3rd Cir. 1973); *Ciccarone v. United States*, 486 F. 2d 253 (3rd Cir. 1973); *Portis v. United States*, 483 F. 2d 670 (4th Cir. 1973); *Bridgford v. United States*, 550 F. 2d 982 (4th Cir. 1977); *United States v. Reid*, 251 F. 2d 691 (5th Cir. 1958); *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962); *Beech v. United States*, 345 F. 2d 872 (5th Cir. 1965); *Jordan v. United States*, 503 F. 2d 620 (6th Cir. 1974); *Cooper v. United States*, 442 F. 2d 908 (7th Cir. 1971); *Reilly v. United States*, 513 F. 2d 147 (8th Cir. 1975); *Hungerford v. United States*, 307 F. 2d 99 (9th Cir. 1962); *Brown v. United States*, 353 F. 2d 578 (9th Cir. 1965); *Dulaine v. United States*, 371 F. 2d 824 (9th Cir. 1967) cert. den. 387 U. S. 920, 18 L. Ed. 2d 973, 87 S. Ct. 2034, reh. den. 389 U. S. 890, 19 L. Ed. 200, 88 S. Ct. 18; *Ashley v. United States*, 413 F. 2d 490 (9th Cir. 1969); *Casias v. United States*, 532 F. 2d 1339 (10th Cir. 1976).

condition until 1940, when he became incapacitated. Deciding that dismissal of the action because the statute of limitations had expired would be unconscionable, this Court said, "We do not think that the humane legislative plan intended such consequences to attach to blameless ignorance." *Id.* at 170.

In many situations, in order to discover an act of malpractice, the plaintiff need be aware only of the causation and the damages. In those instances, the fact of negligence necessarily follows from that knowledge.[2] Even a layman can deduce negligence from certain instances of cause and effect.

In other circumstances, however, the plaintiff may still be blamelessly ignorant even where the causation and the damage are known or suspected by him. Those situations require a different approach, in order to eschew the result that the Urie court sought to avoid by propounding the blameless ignorance doctrine.

As a further refinement to the Quinton and Urie doctrines, the courts have developed a four-pronged test in situations where the two-pronged test is inadequate to prevent manifest injustice due to blameless ignorance. Under the test the plaintiff's cause of action accrues when he becomes aware of four elements, (1) causation, (2) damage (3) duty of care by the physician and (4) breach of the duty of care. The courts apply the four-pronged test when causation and damages are known by the plaintiff but other factors impede the plaintiff from understanding that such causation and damages are related to malpractice. The four-pronged test has been applied

2. *Brown v. United States, supra,* (where oxygen caused brain damage in an infant); *Richter v. United States*, 551 F. 2d 1177 (9th Cir. 1977) and *Hammond v. United States*, 388 F. Supp. 928 (E.D. N.Y. 1975) (where polio shots caused polio); *Reilly v. United States, supra,* (where the use of a mechanical respirator caused plaintiff to completely lose her voice).

where the plaintiff has been hindered from discovery of negligence because of the misrepresentations of physicians,[3] and where the injury and the causation are so technically complex that it is not apparent that the ultimate cause was negligence.[4]

In the instant case, both exceptions to the two-pronged test are present; therefore, the four-pronged test was appropriately applied by the trial court. The Government itself, through the Veterans Administration, repeatedly and consistently told the Respondent from 1969 until 1973 that there was no malpractice and that there was no causal connection between Neomycin and his injury. The Government, at page 9 of its Petition to this Court, states "Perhaps there would be an argument for tolling the Statute [28 U. S. C. 2401(b)] if there were some impediment to obtaining such advice."

Clearly, there were impediments to Mr. Kubrick's determining that his treatment was negligent—the Veterans Administration Claims Board, and the Board's physicians and investigators. A layman like Kubrick, with no special medical knowledge, could easily conclude that there was neither causation nor malpractice as a result of representa-

3. *Jordan v. United States, supra,* (where doctors in an apparent cover-up, represented to plaintiff that his loss of vision resulting from an operation was attributable to the seriousness of his sinus condition, rather than malpractice during the operation). *Bridgford v. United States, supra,* (where doctors told the plaintiff that they had mistakenly cut a vein but that it had been repaired; and where doctors attributed Bridgford's further complaints to emotional causes). *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977) (where physicians informed plaintiff he was suffering from degenerative arthritis, when he was actually suffering from necrosis).

4. *Portis v. United States, supra,* (where the plaintiff's hearing loss was caused by the intravenous administration of neomycin). *Exnicious v. United States, supra,* (where plaintiff's shoulder disability, necrosis, was caused by his being operated on, while he had a streptococcal infection).

tions made to him by the Veterans Administration. The "different rule," as the Government refers to the four-pronged test in their brief at page 12, is necessary in cases such as the instant one, where an innocent layman is misled by an array of medical experts.

The medical causation of Respondent's injury is highly technical and complex and is a further reason for the four-pronged test's application.

The Government seeks to distinguish some Eighth and Ninth Circuit cases from the case at bar and set up an argument based upon a conflict between the circuits. *Brown v. United States, supra, Ashley v. United States, supra, Reilly v. United States, supra,* and *Hulver v. United States,* 562 F. 2d 1132 (8th Cir. 1977), all apply the two-pronged test. The application is factually warranted and isolated to the circumstances of each case. In all of these cases, the injury that resulted was either apparently malpractice even to a layman or the plaintiff was warned against the procedure in question because it could cause the resulting harm. All of the aforementioned Eighth and Ninth Circuit cases rely on the principle, also relied upon the Third Circuit here, that there must be enough information "to alert a reasonable person that there may have been negligence for which the complaint was subsequently made." *Ashley v. United States, supra,* at 493. There was enough in *Ashley, Brown, Reilly* and *Hulver,* that just by knowing causation and damage, the plaintiff should have been alerted that there was negligence. The determination made in the instant case was that there was not enough, just by looking at causation and damages, to alert a reasonable layman to conclude that there was negligence.

The Tenth Circuit applied both the two-pronged and four-pronged tests, consistently with the theory of this rebuttal to the Petition. The two-pronged test was applied in *Casias v. United States, supra,* where, as a result of

injections after a tonsillectomy, Casias' left leg became paralyzed. The same court in a more complex situation, *Exnicious v. United States, supra*, utilized the four-pronged test. There, government doctors misdiagnosed Exnicious' shoulder disability as arthritis. Exnicious later found out it was necrosis caused by his being operated on while he had a streptococcal infection. Exnicious was, like the Respondent here, both misinformed and misfortunate enough to have a condition that was causally technically complex.

In essence there is no conflict between the circuits worthy of having this court accept the instant Petition—what we have are simply different standards based upon different factual situations.

The Government warns of masses of litigation flowing from the decision in this case; this alarm is without substance. The broader test is only applied in situations where there are either misrepresentations or technically complex medical conditions, both of which are a rarity. In any case, a plaintiff, who is misfortunate enough to either have a technically complex injury or be hindered in his determination of the causation and possible malpractice involved in his injury should not be precluded from recovery. Blameless ignorance as a bar to suit is what this Court has ordered the lower courts to avoid.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 22, 1979.